STATE OF MICHIGAN

COURT OF APPEALS

VALERIE J. ALLAN,

Plaintiff/Counterdefendant-Appellee,

v

EMAD DEAN ALLAN, a/k/a EMADEDDIN ALLAN,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
February 28, 2006

No. 259126
Wayne Circuit Court
Family Division
LC No. 03-334217-DM

Before: Hoekstra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce, challenging the trial court's decision to award plaintiff sole custody of the parties' four children, its division of the marital estate, and its denial of his requests for spousal support and attorney fees. We affirm in part, reverse in part, and remand for further proceedings.

I

Defendant first argues that the trial court erred by refusing to award joint custody of the parties' minor children. We disagree.

"All custody orders must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Mixon v Mixon*, 237 Mich App 159, 162; 602 NW2d 406 (1999); see also MCL 722.28. The trial court's findings regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004). The trial court's ultimate custody decision is reviewed for an abuse of discretion. *Id.*

The trial court considered the twelve best interest factors in MCL 722.23 and determined that five of the factors did not favor either parent, while five others favored plaintiff.[1] Defendant argues that the trial court erroneously evaluated the factors set forth in MCL 722.23(b), (c), (g), (h), and (j). After reviewing the record, we are not persuaded that the trial court's findings regarding these factors are against the great weight of the evidence. *Mixon*, *supra*; *Thompson*, *supra*. On balance, it is apparent that the best interest factors clearly favored plaintiff, and that the trial court also gave significant weight to the preferences of the children in deciding to award custody to plaintiff. According to the trial court, the children expressed a preference to remain together and primarily live with plaintiff, and the children were at an age where they were old enough to express a preference. Under these circumstances, we conclude that the trial court did not abuse its discretion in determining that it was in the children's best interests to award custody to plaintiff.

Defendant also challenges the trial court's decision not to award him joint custody. However, an award of "joint custody" would mean that the children could either alternately reside with each parent or the parents would share in the decision-making authority on important decisions that affect the children's welfare. *Mixon*, *supra* at 162-163; MCL 722.26a. Here, it is apparent from the trial court's findings that the court did not believe that having the children alternately reside with each parent was appropriate, considering their ages and preferences. It is also apparent that the court did not believe that the parties could agree on basic issues involving the children. As this Court explained in *Fisher v Fisher*, 118 Mich App 227, 232-233; 324 NW2d 582 (1982):

> In order for joint custody to work, parents must be able to agree with each other on basic issues in child rearing—including health care, religion, education, day to day decision-making and discipline—and they must be willing to cooperate with each other in joint decision-making. If two equally capable parents whose marriage relationship has irreconcilably broken down are unable to cooperate and to agree generally concerning important decisions affecting the welfare of their children, the court has no alternative but to determine which parent shall have sole custody of the children. The establishment of the right to custody in one parent does not constitute a determination of the unfitness of the noncustodial parent but is rather the result of the court's considered evaluation of several diverse factors relevant to the best interests of the children. [Citations omitted.]

The record discloses that there were fundamental differences between the parties regarding how and when the children should be disciplined, their schooling, and whether the children were mature enough to handle additional responsibilities. In light of these differences, the trial court did not abuse its discretion by declining to award joint custody.

II

[1] The remaining two factors were not applicable.

Defendant next argues that the trial court erred by refusing to allow Dr. Joan Greenfield to testify as his expert witness on the issue of custody. This Court reviews a trial court's decision regarding the admissibility of expert testimony for an abuse of discretion. *In re Wentworth*, 251 Mich App 560, 562-563; 651 NW2d 773 (2002).

Contrary to defendant's assertion, the trial court did not preclude him from calling Dr. Greenfield to testify on the issue of custody. Rather, it merely denied defendant's request that the children and plaintiff be compelled to submit to an evaluation by Dr. Greenfield for purposes of Dr. Greenfield making recommendations on custody. The court denied defendant's request because Dr. Greenfield was not an independent witness, and because it had already appointed its own independent expert to evaluate the family and make a recommendation on custody matters, as permitted by MRE 706(a). Although MRE 706(d) provides that the parties may call their own expert witnesses even if the court appoints its own expert, that rule was not offended in this case. As already noted, the court did not preclude defendant from calling Dr. Greenfield to testify on the issue of custody. Although the trial court ultimately did not follow the recommendation of its expert, it was not required to do so and this does not establish that the court abused its discretion by denying defendant's request to subject plaintiff and the children to evaluation by Dr. Greenfield for the purpose of Dr. Greenfield making recommendations on custody.[2]

III

Defendant next argues that the trial court erred in its division of the marital assets. The standard of review for dispositional rulings of a trial court in divorce actions is summarized in *McNamara v Horner (After Remand)*, 255 Mich App 667, 669-670; 662 NW2d 436 (2003):

> In a divorce action, this Court's review of the trial court's factual findings is limited to clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990); *Pelton v Pelton*, 167 Mich App 22, 25; 421 NW2d 560 (1988). A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Beason*, *supra* at 802; *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). If the trial court's findings of fact are upheld, we then must decide whether the dispositive ruling was fair and equitable in light of those facts. *Sparks*, *supra* at 151-152; *Welling v Welling*, 233 Mich App 708, 709; 592 NW2d 822 (1999); *Draggoo*, *supra* at 429. A dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993); *Welling*, *supra* at 709-710; *Draggoo*, *supra* at 429-430. Further, assets earned by a spouse during the marriage, whether they are received during the existence of the marriage or after

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[2] To the extent defendant relies on MCR 2.311(a), which permits the trial court to order the mental examination of a party, we note that this rule requires that the moving party establish good cause for ordering the examination. We find no such cause where, as here, an independent expert has been appointed by the trial court pursuant to MRE 706(A).

> the judgment of divorce, are properly considered part of the marital estate. *Vander Veen v Vander Veen*, 229 Mich App 108, 110; 580 NW2d 924 (1998); *Byington v Byington*, 224 Mich App 103, 110; 568 NW2d 141 (1997). Generally, marital assets are subject to division between the parties, but the parties' separate assets may not be invaded. *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997).

The trial court set out to divide the marital assets equally between the parties. The court awarded plaintiff the equity in the marital home, three rental properties, two investment accounts, her pension, and a portion of her 401k account. Defendant also received three rental properties and a portion of plaintiff 's 401k account. However, the court also included as part of defendant's share of assets (1) $65,000 that it believed defendant took from the parties' joint funds, (2) $57,700 that it believed defendant took or used from a rental property repair and maintenance fund, and (3) $56,054 that it characterized as "waste of assets" for allowing rental properties to remain vacant.

We agree with defendant that the evidence does not support the trial court finding that he took $65,000 from the parties' joint accounts and converted that money for his own personal use. Defendant admitted taking money out of a joint account, but testified that he returned the money to their account and the money was later jointly spent by the parties. No contrary evidence was offered. In fact, plaintiff admitted that the money defendant took from an equity line of credit was either used to pay joint bills or returned to the parties' joint accounts. The trial court clearly erred in finding that defendant converted that amount for his own personal use.

In addition to finding that defendant took $65,000 from joint accounts, the trial court also held that defendant was responsible for $57,700, which the court believed defendant obtained from another equity line of credit, but was not used for the rental properties. Although defendant admitted that the parties borrowed against the equity in their properties, there was no evidence that defendant set aside a large sum of money for his own personal use, as opposed to using the sums borrowed from the equity lines to pay other expenses. Indeed, it appears that the trial court may have assessed defendant twice based on the same testimony that he borrowed money from the parties' home equity accounts. We agree with defendant that the evidence did not support holding him responsible for either amount. We note that plaintiff did not request the trial court to hold defendant responsible for either amount, and does not attempt to explain on appeal how the evidence supports the $57,700 amount determined by the trial court.

Because the evidence does not support the $65,000 and $57,700 amounts assessed against defendant by the trial court, we vacate those assessments and remand for recalculation and adjustment of the trial court's property division.

The trial court also held defendant responsible for a loss of $56,054, which it characterized as "waste of assets" for mismanaging the parties' rental properties and allowing the properties to remain vacant for approximately three years. This amount is based on the testimony of plaintiff's accounting expert, Karl Fava, who testified that the $56,054 figure included lost rental income, loss of investment income as a direct result of the loss of additional rental income, and the out-of-pocket cost to the parties to maintain the properties while they were not earning income. Citing Fava's failure to consider the tax and building repair savings enjoyed by the parties as a result of these losses, defendant challenges the accuracy of Fava's figures and

the trial court's reliance thereon. However, Fava testified at trial that the "cash flow analysis" used by him in arriving at the $56,054 figure "actually takes into account the tax benefit of what these three pieces of real estate had provided to the [parties] household," and that including additional repair expenses within his already "conservative" analysis would have made "the loss just that much worse."

Contrary to defendant's assertion, it was not disputed that it was defendant who was responsible for leasing and maintaining the parties' rental properties. Although defendant offered a number of reasons regarding why he did not maintain and lease the various rental properties, the trial court was within its right to reject defendant's explanations and agree with Fava that defendant's negligent management of the properties negatively affected the parties' cash flow in the amount of $56,054. Consequently, we do not conclude that the trial court erred in holding defendant responsible for this loss.

Nor did the trial court err by refusing to include defendant's credit card debt in the property division. Rather, the court properly ordered each party to pay their own credit card debts. The trial court also did not err by reducing the net equity of the martial home by approximately $10,000 for repairs made to one of the rental properties. The parties agreed that the repairs would be financed through a home equity loan against the marital residence. Because this was a joint debt, the equity in the home awarded to plaintiff was properly reduced by that amount.

IV

Defendant argues that the trial court erroneously allowed plaintiff to offer expert testimony on the value of her Ford Motor Company pension, and also in its valuation of this asset. We disagree.

Although defendant contends that he did not have notice that Michelle Klippstein intended to testify regarding the value of plaintiff's pension, there was no dispute that Klippstein was listed on plaintiff 's witness list. Moreover, plaintiff's pension was a significant asset in the case, and thus defendant should have anticipated that plaintiff would offer testimony of its value. The trial court did not abuse its discretion by allowing Klippstein's testimony. *In re Wentworth, supra*.

Moreover, the trial court's valuation of plaintiff's pension is supported by Klippstein's testimony. The trial court was required to determine the rights of the parties to plaintiff 's pension, MCL 552.101(4)(a), but was not obligated to divide the pension. The court awarded this asset to plaintiff without granting any rights to defendant, but offset the present value of the pension against other assets received by defendant.

The party seeking to include a pension for distribution in a property settlement has the burden of proving the reasonably ascertainable value of the pension. *Magee v Magee*, 218 Mich App 158, 165; 553 NW2d 363 (1996). There are different methods for distributing a pension as an asset. No one valuation method must be followed by the trial court. *Heike v Heike*, 198 Mich App 289, 292; 497 NW2d 220 (1993). Here, the trial court distributed this asset to plaintiff by relying on its present value, which is an acceptable method. *Boyd v Boyd*, 116 Mich App 774, 782; 323 NW2d 553 (1982) (opinion of Bronson, J.). Another alternative is to defer distribution

of the pension until the party entitled to it begins receiving the benefits, *id*. at 783, which appears to be the method that defendant advocates here. That method was not followed in this case because defendant did not offer testimony regarding how the pension should be valued and divided under this method. In any event, considering that plaintiff expected to work at least another 20 years before she would be entitled to receive benefits under her pension, delaying distribution was not a favored method of valuing and distributing this asset. *Id*.

Defendant asserts that various factors will affect the value of plaintiff's pension in the future. On cross-examination by defense counsel, Klippstein testified that Ford's three basic pension plans for managers do not provide a cost-of-living increase. In any event, Klippstein calculated only the present value of the pension and to the extent that possible contingencies might affect the value of this asset, they do not appear to change the present-day value of the pension. Regardless, if defendant believed that the pension should have been calculated to account for future contingencies, it was his obligation to establish factual support for this factual position through appropriate testimony. *Magee*, *supra*. Defendant has not shown that the trial court erred in its valuation or distribution of this asset.

V

Next, defendant challenges the trial court's decision to impute annual income of $50,000 to him. Defendant does not argue that it was improper to impute some income to him, but argues that the $50,000 amount imputed by the trial court was excessive. We review the trial court's factual finding in this regard for clear error. *McNamara*, *supra* at 669.

Defendant has a degree in chemical engineering, but had not worked in that field for several years. Although we agree with defendant that some jobs for which he was qualified would require additional training or education before he could expect to earn $50,000 a year, expert testimony was presented that defendant could earn that amount of money in other jobs that did not require significant training, such as using his educational and language skills as an interpreter or tutor. In addition, the trial court may have imputed additional income to defendant based on the rental properties, which the testimony established could increase his annual income by approximately $15,000. The trial court did not clearly err by imputing income of $50,000 to defendant on an annual basis.

VI

Defendant next argues that the trial court erred by refusing to award him spousal support. We disagree. The main purpose of spousal support is to balance the incomes and needs of the parties without impoverishing either party. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). An award of spousal support "is to be based on what is just and reasonable under the circumstances of the case." *Id*.

> Among the factors that should be considered are: (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the

> support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003) (citations omitted).]

The court may also take into account any other relevant circumstances. *Magee*, *supra* at 162.

In this case, the trial court considered defendant's request for spousal support, but after analyzing the relevant factors, declined to do so. The court concluded that defendant had the ability to work and earn $50,000 a year, but was unwilling to work. Further, he was able to earn rental income from some of the assets he received in the property distribution. Although defendant had assisted in raising the children, it was undisputed that he could have returned to work, at least part time, when the parties' youngest child began attending school full time many years earlier. Defendant had a college degree in chemical engineering, was bilingual, and had marketable job skills. The court did not clearly err in finding that there was no reasonable explanation for why defendant could not have actively sought work to help out with the family's finances. *Moore*, *supra*. The court also found that defendant was at fault in causing the divorce because he refused to help financially support the family. Defendant admitted that he neglected properly caring for the parties' rental properties, which adversely affected the parties' cash flow. Finally, the court found that plaintiff was not in a position to financially support defendant.

For these reasons, the trial court's decision not to award spousal support was not unfair or inequitable. *Id*. at 654-655.

VII

Defendant next argues that the trial court erred by denying his request to recall plaintiff as a witness after Karl Fava testified. Defendant does not cite any authority in support of this argument. An appellant may not leave it to this Court to search for authority to sustain his position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). In any event, the record discloses that defendant had the opportunity to examine plaintiff previously. Defendant did not explain below, and he does not attempt to explain on appeal, why it was necessary to recall plaintiff after Fava testified. Defendant has failed to demonstrate that the trial court abused its discretion by declining to recall plaintiff as a witness. *Winiemko v Valenti*, 203 Mich App 411, 418; 513 NW2d 181 (1994).

VIII

Defendant also argues that the trial court erred by denying his request for attorney fees. The trial court refused to award attorney fees to either party because it found that both parties had sufficient assets from which to pay their own attorney fees.

In a divorce action, attorney fees are not recoverable as of right, but may only be awarded where necessary to preserve a party's ability to carry on or defend the action. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). See also MCL 552.13(1); MCR 3.206(C)(2). This Court reviews a trial court's decision whether to award attorney fees for an abuse of discretion. *Stoudemire*, *supra*.

The evidence established that defendant was capable of working and supporting himself throughout this case, but chose not to return to work until after the divorce was resolved. Any inability of defendant to pay his own attorney fees was due solely to his decision not to work. The trial court did not abuse its discretion by declining defendant's request for attorney fees.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Donald S. Owens